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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

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3 UNITED STATES OF AMERICA,

4 v.

13 CR 897 (RWS)

5 BLADIMIR RIGO,

6 Defendant.

7 -----x

8 New York, N.Y.
9 December 2, 2014
11:13 a.m.

10 Before:

11 HON. ROBERT W. SWEET,

12 District Judge

13
14 APPEARANCES

15 PREET BHARARA,

16 United States Attorney for the
Southern District of New York

17 EDWARD DISKANT

Assistant United States Attorney

18 JOANNA HENDON

19 ALICIA K. ANDUR

SHARANYA SAI MOHAN

20 Attorneys for Defendant

21
22 ALSO PRESENT: SELVA NEBBIA, Spanish Interpreter
23 ERICA DE LOS RIOS, Spanish Interpreter
24
25

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(In open court)

THE COURT: Please be seated.

(Case called)

MR. DISKANT: Good morning, your Honor. Edward
Diskant for the government.

MS. HENDON: Yes, good morning, your Honor. Joanna
Hendon, and with me are Alicia Andur and Sharanya Sai Mohan for
Mr. Rigo, who is also here.

THE COURT: Yes. I guess the government has the
burden.

MR. DISKANT: Yes, your Honor.

THE COURT: I'll hear you.

MR. DISKANT: Thank you, your Honor. And I want to
start with that burden because I think it is important, and I
know the Court is familiar with it, but to guide our discussion
today, which is that the government's burden in this respect is
a preponderance standard, which is a more-likely-than-not
standard, and the factual finding the Court is required to make
is a reasonable estimate of loss here.

And that's a very important thing to keep in mind
because both the Second Circuit case law and the guidelines
themselves expressly invite the Court to engage in any number
of methods that amount to approximations or estimates. Indeed,
every time the Second Circuit has been asked by a defendant to
impose a higher burden on the government, to force the

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1 government to prove with exactitude something like the loss
2 amount, the Second Circuit has rejected that, both because it
3 finds due process doesn't require it and it talks of a need to
4 preserve judicial economy, which is certainly something to keep
5 in mind here.

6 So with that sort of by way of overview, let me talk
7 briefly through what the government believes establishes its
8 more-likely-than-not burden with respect to the loss amount it
9 would encourage the Court to find here, which is that of more
10 than \$7 million.

11 Now, going to the evidence, and I want to talk through
12 the recording that the government offered and the drug ledgers
13 that the government offered and, finally, the testimony of
14 Mr. Reyes-Arias. I think it bears mention that a lot is not in
15 dispute here. There's, obviously, no dispute that the
16 defendant was a participant in this scheme. He has pled guilty
17 to that. The Court has heard a recording in which the
18 defendant discusses that.

19 I think there's also no dispute that the defendant was
20 involved in this scheme for quite a number of years. Again,
21 the defendant's own guilty plea allocution establishes his
22 involvement in this for quite a number of years. There's
23 discussion on the recording about that.

24 THE COURT: Well, really, we're talking about two
25 years -- I'm talking now about the plea. Two years and, what

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1 was it, many years before?

2 MR. DISKANT: I believe what he said was that he was
3 principally involved between 2012 -- 2010 and 2012 with some
4 involvement before that, yes. It's during the years mainly
5 2010 to 2012 but also in previous years. That's what he said
6 in his guilty plea.

7 And the Court has also heard testimony from
8 Mr. Reyes-Arias. The government pointed the Court to proffer
9 notes with another defendant, Rogelio Leyba, who substantially
10 corroborates that the involvement actually spanned back to the
11 late 1990s or early 2000s. But even if the Court were to focus
12 just mainly on those 2010 to 2012, it is quite apparent from
13 the defendant's own words that his involvement in this scheme
14 spanned considerably beyond the single conversation that the
15 defendant would have the Court to focus on. Again, that really
16 doesn't appear to be in dispute here.

17 And the third broad issue that the government would
18 submit that should not be in dispute here is that the defendant
19 was a big-time player in this scheme because, again, the
20 defendant tells you that himself. There's a recorded meeting
21 between the defendant and Hermendigildo Fernandez, who's known
22 as "Pancho," in which they talk about themselves as the two big
23 players in New Jersey. Those were the defendant's own words.

24 He draws that comparison himself, which is highly
25 relevant in this context for two reasons. The first is that

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1 the guidelines expressly invite the Court to use that sort of a
2 comparison in reaching a loss amount. So to the extent the
3 Court is concerned with the dearth of evidence -- we don't
4 believe there is one, but with a lack of evidence with respect
5 to this defendant's specific participation, the guidelines
6 expressly invite the Court to calculate loss by drawing a
7 comparison to a similar operation.

8 And as the Court knows, Mr. Fernandez had more than
9 \$6 million worth of these medications in a storage locker at
10 the time he was arrested. The defendant, himself, tells you
11 that is a similar operation. They are the two big-time players
12 in New Jersey. They are buying from the same suppliers. They
13 are selling to the same customers. That, alone, provides the
14 Court with a basis in the guidelines themselves for finding a
15 loss amount of between two-and-a-half and \$7 million.

16 Let's talk a little bit more about that recording
17 because on that recording there are actually at least two
18 specific transactions discussed. The first is the
19 \$25,000 transaction that the defendant concedes he is
20 responsible for, and the details of that transaction are
21 critical in this context for a number of reasons.

22 First, the defendant plans to purchase those drugs
23 from Arcadio Reyes-Arias and Rogelio Leyba. That is the
24 government cooperator, who took the stand and testified to
25 selling to the defendant and another man that the Court has

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1 heard also sold to the defendant. The defendant tells you
2 himself he was buying from those two people.

3 The defendant also tells you himself the types of
4 quantities he was buying. He's going to buy \$25,000 in street
5 value worth of these medicines at a time. That is entirely
6 consistent with the testimony the Court heard about the
7 quantities and volumes that were being sold to this defendant.

8 Now, with respect to loss amount, \$25,000 isn't the
9 end of the story because that's the street value. The actual
10 loss to Medicaid, the government would submit, is approximately
11 ten times that. And we offered during the hearing itself, and
12 it's highlighted in our brief, how it is we get from the street
13 value to the Medicaid-reimbursement value. And the clearest
14 and most direct way that we get there is through just taking a
15 look at a number of controlled purchases of drugs that were
16 made during this case.

17 So, for example, the Court heard about four different
18 times in which the government purchased street medicine from
19 either Arcadio Reyes-Arias, who testified here, or Rogelio
20 Leyba. And in each time the government purchased approximately
21 \$5,000 in the street value worth of medicine and in each case
22 the government got approximately \$50,000 or ten times that in
23 Medicaid reimbursement value. That is the amount of value
24 these drugs had when Medicaid paid for them in the first
25 instance. That is the loss value in this case.

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1 So when the defendant buys \$25,000 worth of medicine
2 at street price from Reyes-Arias, he is contributing to a loss
3 of approximately \$250,000 to Medicaid because that's what
4 Medicaid paid for those drugs. So that's the first loss that
5 is discussed expressly on the recording.

6 But the second loss that is discussed expressly on the
7 recording is where the defendant talks about how another scheme
8 participant, someone named Conrado Vasquez, stole \$200,000
9 worth of medicine from him. Again, he's talking about street
10 value; so \$200,000 worth of medicine is approximately
11 \$2 million in Medicaid reimbursement value. That's the deal
12 that the defendant did with Conrado Vasquez that went bad.

13 So there alone you have approximately \$2.25 million in
14 loss. That is the \$250,000 on the \$25,000 deal, and the \$2
15 million on the \$200,000 with Conrado Vasquez. Going no
16 further, you have \$2 million worth of losses that the defendant
17 tells you about himself.

18 By the way, you know that Medicaid is a victim here
19 because the defendant admitted to that. That was part of his
20 allocution. He concedes that he knew that Medicaid was paying
21 for these bottles.

22 There's been the drug ledgers, and the drug ledgers,
23 the government would submit, establish an additional loss of
24 approximately \$2.4 million, and we've excerpted these as
25 Government Exhibit 202. Government Exhibit 202 is

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1 approximately 12 to 13 pages. They were recovered from a
2 series of notebooks that the defendant concedes were his.

3 These are notebooks that were recovered from the
4 defendant's bedroom. They had the defendant's other personal
5 items in them, including doodles by his children and
6 grandchildren, receipts and bills. And by the way, those
7 receipts and bills make very clear that these notebooks were
8 recent. That is, the bills were for the months leading up to
9 his arrest. These are not historical items. These are his
10 current business dealings.

11 The government would submit that the only logical
12 inference to be drawn from these documents is that these are
13 drug ledgers accounting for his involvement in the scheme.
14 That is where he lists 35 Atripla, a hundred Truvada, 70
15 Reyataz. He's referring to bottles of the medicine that he's
16 either buying from someone or selling to someone.

17 And the defendant makes a great deal about the fact
18 that the government doesn't have a handwriting expert. We
19 would submit that we don't need one because given the fact that
20 the defendant is charged with participating in a conspiracy, it
21 really doesn't matter where the defendant created these lists
22 or these lists were given to the defendant by someone who was
23 supplying drugs to him. The important point is they establish
24 his involvement in the scheme, and they give the Court some
25 context, critically for these purposes, about the volume of his

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1 involvement.

2 So for example, Page 3 of Government Exhibit 202 is a
3 list that the Court heard about from Arcadio Reyes-Arias.
4 You'll recall that Reyes-Arias testified to selling these
5 bottles of medicine to the defendant, and he told you, this is
6 my handwriting. I created this list as a list of the bottles
7 that I had for sale, and the defendant wrote in the prices he
8 was willing to pay for them.

9 So is all of the handwriting in these documents the
10 defendant's? No. The government has never suggested as much.
11 The point is that these documents establish the volume with
12 which the defendant was participating.

13 So the government took these documents, and they
14 applied the New York State Medicaid reimbursement value to
15 them, and with those values, we calculated a total Medicaid
16 loss for the bottles listed in these drug ledgers of
17 approximately \$2.4 million. We would submit that that's
18 another \$2.4 million in loss amount added to the \$2.25 million
19 discussed on the recording, that brings us to a total of at
20 least \$4 million in loss to Medicaid by the defendant.

21 And by the way, it bears mention that the government's
22 inference, the inference we are urging the Court to draw from
23 the drug ledgers, is not only consistent with common sense,
24 it's consistent with the other evidence that the Court heard in
25 the hearing. It's consistent with the defendant describing

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1 himself as a big-time player in this scheme. It's consistent
2 with the testimony from Arcadio Reyes-Arias who told you that
3 he was selling these drugs to the defendant in volumes that are
4 very, very comparable to the ones listed in this drug ledger.

5 So, for example, Page 3 of this drug ledger, which
6 Mr. Reyes-Arias told you was his handwriting, lists a total
7 sale of approximately \$11,605 in street value of drugs. That's
8 entirely consistent, in fact it's a little higher than
9 Mr. Reyes-Arias' estimate of his average sales to the
10 defendant. That's four-and-a-half, approximately, million
11 dollars in loss alone, even if the Court were to essentially
12 ignore the cooperator testimony and focus solely on the records
13 in this case and solely on the recording of the defendant's own
14 voice.

15 But the Court did hear if Mr. Reyes-Arias, and we
16 would submit to you that Mr. Reyes-Arias was truthful with you
17 to the best of his ability; that he has told the government
18 essentially the same narrative from the outset, which is that
19 he began working for this defendant in the late 1990's or
20 approximately 2000, that he worked for him in a bodega in
21 Newark, New Jersey, buying approximately 100 bottles of these
22 medicines a week and he did so until 2005.

23 And in 2005 he went out on his own. He started his
24 own bodega, and he continued to buy these medicines and to sell
25 them both to the defendant and Hermendigildo Fernandez, that is

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1 Pancho. He has always been consistent about the fact that
2 starting at that point, Pancho was his primary customer, but
3 that he also sold to this defendant. He said that on direct.
4 He said that on cross-examination. He said that in his
5 proffers with the government.

6 The core issue for the Court to focus on is the amount
7 he was selling to the defendant, obviously, and the estimate
8 that he provided to the Court was approximately 3,000 to
9 \$8,000 once a month. So we took that amount, we took an
10 average value of approximately \$5,000, somewhere between three
11 and \$8,000. And knowing that the street value is about a tenth
12 of the Medicaid reimbursement value, we just did the math and
13 we laid that out in a chart for the Court in our brief. It's
14 Page 20 of our brief, which lays out that the defendant was
15 receiving approximately \$600,000 in Medicaid reimbursement
16 value medicines from Mr. Reyes-Arias each year, and that
17 doesn't take account of medicines he was buying from other
18 sources, just the bottles he was buying from this defendant.

19 That comes out to a total rough loss of about
20 \$4.8 million just for the period 2005 to 2012. So taking that
21 \$4.8 million and adding it to the approximately \$4.5 million
22 covered in the drug ledgers, covered in the recording, the
23 Court is already very, very comfortably in that 7 to
24 \$20 million range, which is the range the government is urging
25 the Court to find.

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1 And that doesn't even touch the hundred or more
2 bottles per week that the witness was buying for the defendant
3 between 2000 and 2004. It doesn't include any of the bottles
4 that Rogelio Leyba was purchasing and selling to the defendant.
5 It doesn't include any of the bottles the defendant was
6 obtaining from other people, other people who worked at his
7 bodegas. It is a conservative estimate, it is an estimate
8 based on the evidence, and it is a reasonable estimate of loss
9 in this case.

10 And let me just finally note, with respect to
11 Mr. Reyes-Arias' testimony, again, the ways in which it is
12 corroborated by the other evidence in the case because I'm sure
13 there's going to be quite a bit of attack on him and his
14 testimony, as we have seen in the defense brief. And we would
15 simply ask the Court to evaluate the testimony on its own.

16 It is corroborated by the drug ledgers, which as noted
17 seem to show sales of exactly the amounts or precisely exactly
18 the amounts that the witness described selling to the
19 defendant. It is consistent with the defendant's description
20 of himself as a big-time player. It is consistent with the
21 recording in which the defendant himself talked about buying
22 medicine from the witness. He was going to buy \$20,000 in
23 street value worth of medicines from the witness at a time.

24 It's clearly entirely consistent with what
25 Mr. Reyes-Arias told you about himself, his conduct and his

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1 involvement with the defendant. And one final note in that
2 regard, it bears particular mention that Mr. Reyes-Arias has
3 very, very little incentive to inflate the numbers because
4 Mr. Reyes-Arias is going to be held responsible for all of
5 those losses himself. So to the extent that he is
6 exaggerating, to the extent that he's telling you about sales
7 that didn't occur, the joke, I would submit, is ultimately on
8 him because he will be held responsible for all of those losses
9 as part of his sentencing as well.

10 Unless the Court has other questions, I'm happy to
11 rest on my submission.

12 MS. HENDON: May I, your Honor?

13 THE COURT: Yes.

14 MS. HENDON: Thank you. Thank you, your Honor. I'd
15 just like to address a couple of the comments made by the
16 government this morning, and it's interesting to me that the
17 government's theory of loss just keeps shifting in this case.
18 We came to the Fatico hearing and I actually subpoenaed Pancho,
19 Mr. Hernandez, to be here outside the courtroom because the
20 government's theory initially had been that the warehouse of
21 drugs was somehow going to be connected to my client or the
22 government would seek to associate that warehouse of drugs with
23 my client. And that was the big \$6 million megillah that was
24 driving the loss calculation that found its way into the draft
25 PSR.

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1 So Mr. Fernandez was in court all day. Of course, I
2 had no desire to call the government's cooperator on my case,
3 but he was there in case I had to resort to some sort of
4 rebuttal testimony on that because, of course, his
5 3500 material was full of disclaimers about my client's
6 involvement with the warehouse.

7 For the first time, we're hearing in the briefing and
8 in oral argument today that the Court should ascribe a
9 two-and-a-half million dollar loss to some discussion on the
10 tape recording of a man named Conrado. Now, the government
11 didn't advance any proof or argument on that point, as best I
12 can recall, at the hearing.

13 And I invite your Honor to look at Pages 28 and 29 of
14 Government's Exhibit 211-T, which is the transcript in
15 evidence. Were this or any Court to premise a loss calculation
16 on the \$200,000 event discussed on that tape, based on the
17 prosecutor's argument, I think that would be reversible error.

18 There is nothing in the transcript that affords the
19 Court, by a preponderance of the evidence, a basis for
20 concluding that this has anything to do with medicines other
21 than that he's talking to a competitor about the drug business
22 generally. The statement in the transcript at Page 29 by my
23 client is -- Mr. Fernandez says on Page 29: "Oh, this guy
24 spoke to me one day..." I think they're speaking over each
25 other. And Mr. Rigo says: "Between Conrado and my

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1 brother-in-law, they stole from me. They stole from me almost
2 \$200,000." Mr. Fernandez says: "They did?" And Mr. Rigo
3 says: "Yes. Right there, with those two, I was done."

4 There's no discussion of what the theft of the money
5 was about. Mr. Rigo has bodegas. He has legitimate
6 businesses. Even when he was in the drug business, he had
7 legitimate businesses. The government did nothing at the
8 hearing, there's nothing in the record, to establish who this
9 person Conrado is.

10 The government introduced evidence at the hearing
11 about a defendant in the drug business named Conrado, but they
12 did nothing with this transcript at the hearing. They knew
13 Mr. Fernandez, who is the party to this conversation with my
14 client, was here all day. If they wanted to establish a basis
15 for the Court making loss determinations based on anything said
16 in the transcript, they had a live witness whom they could have
17 called and asked questions to, and that witness could have laid
18 a foundation for the Court making such a finding, but they
19 didn't do that. And we have these stray words in a transcript.

20 Mr. Diskant repeatedly said your Honor heard a tape
21 recording. The government didn't play a tape recording for the
22 Court. We have the government's transcript. That's fine.
23 It's in evidence, but the stray reference to my client having
24 been stolen from, robbed by his brother-in-law, as to whom
25 there's no evidence in the record of any kind and someone named

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1 Conrado, is an inadequate basis for leaping to a \$2.5 million
2 loss figure. That's just inviting speculation, and I think the
3 Court can be comfortable that that is exactly what it is by the
4 lateness of the government's proffer on this point.

5 Now, before I address the question of reasonable
6 estimates of loss, I'd like to make a broader point about this
7 litigation. Mr. Rigo, early on, announced that he'd like to
8 plead guilty to the indictment and put the government to its
9 proof regarding loss. What happened next? The probation
10 department was given a loss estimate of between 7 and
11 \$20 million. Fine.

12 We came to the hearing prepared to establish the lack
13 of credibility in that estimate, to unpack the government's
14 case, to put the government to its burden, and I think we did
15 that. And what happened next? We got the government's
16 post-hearing brief in which the number is now \$30 million, not
17 \$20 million. So we put in a -- we, ourselves, responded to the
18 proof the government adduced at the hearing which, as I said,
19 makes for a thin but legally adequate basis for conviction, but
20 does not support the loss estimates proposed here.

21 We put in our main brief, and I think we did a pretty
22 good job, Mr. Rigo did a pretty good job in his main brief,
23 focusing the Court on the government's defect in the case and
24 on the controlling legal principle.

25 What happened next? We got a reply brief suggesting

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1 that Mr. Rigo should have his acceptance points taken away from
2 him. Now, I raise this because I think the Court should
3 consider, in assessing the credibility of the government's
4 presentation from start to finish, this desire to intimidate,
5 frankly, and the will to punish, in this case, a defendant who
6 has asked only for the opportunity to have a hearing and
7 cross-examine live witnesses and cross-examine the government's
8 proof.

9 Now, with that, I'd like to turn to the concept of
10 reasonable estimate. What is a reasonable estimate? Of
11 course, that is what the Court must determine. I do agree with
12 the government on that point.

13 And I want to turn now -- I want to turn, before I get
14 to the government's loss figures which are really the main
15 event here. I want to start with the \$25,000 figure that we
16 referenced in our brief, and I want to make sure that the Court
17 did not misconstrue that as an effort by the defense to be cute
18 here. We do acknowledge, and our client, in pleading guilty,
19 acknowledged that he was involved in this business for a period
20 of time, for between 2010 and 2012 and at other times.

21 So I'm not standing here, your Honor, and saying that
22 if I were to proffer to the Court -- if I were to proffer to
23 the Court a reasonable estimate of loss, and I were to sit and
24 huddle with my client and have him tell me everything he did,
25 that I would come up with \$25,000 or even \$250,000. But it's

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1 not my burden to present a reasonable estimate of loss. And
2 what I meant to establish by putting that figure in, your
3 Honor, is that that's what the government has established.
4 That is all they've established.

5 Now, they certainly disagree with that. They think
6 they've proven much more, and I think I -- I hope I've
7 dispensed with these arguments that we're hearing today, that
8 those 2.5 million lurking on Page 29 of the transcript is not
9 there, and it would be speculation for the Court to find it
10 there. There's discussion of a theft of \$200,000.

11 Putting aside the transcript -- well, one other point
12 about the transcript. The government today argues that because
13 Mr. Rigo refers to Pancho and himself, we're the two big guys
14 in New Jersey, the government argues that the Court should
15 ascribe \$6 million in loss value to Mr. Rigo because that's
16 what they found in Mr. Fernandez's warehouse. That, too, I
17 think, is asking the Court to engage in impermissible
18 speculation, particularly when Mr. Fernandez was here all day.
19 And if he and Mr. Rigo are the two big guys in New Jersey and
20 they've been running parallel operations, as the government
21 asserts but as to which there's no evidence at all other than
22 this stray remark about we're the two big guys, which we didn't
23 even hear in Spanish the tone of voice, the tenor in which it
24 was said, but other than that stray remark, there's nothing to
25 suggest that these two men have parallel operations.

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1 And if the government had evidence that it did, it
2 would have been in the mouth of Mr. Fernandez, whom they could
3 have called and didn't. So constructing multimillion dollar
4 loss figures on the basis of the words in an English
5 transcription of a tape recording, I don't think it was put in
6 evidence, the Court certainly didn't hear it, when we had the
7 cooperating party to the conversation available to the
8 government, who wasn't called, would be improper and
9 speculative.

10 So I think the transcript does nothing more than what
11 we've said all along it does, which is establish why this man
12 pled guilty. He couldn't go to trial with evidence like that,
13 and he needed to take responsibility for his involvement in
14 this crime, and he has.

15 Now, back to where the government focused its energies
16 at the hearing, anyway. They had two bases for a so-called
17 reasonable loss estimate. The first came from Chino -- I'm
18 going to call him Chino because I flip his name around all the
19 time and get it wrong. First came from Mr. Reyes-Arias, and
20 that's where we get the \$30 million figure.

21 The second basis for a purported reasonable estimate
22 are these drug ledgers, and from that second basis, the
23 government asks the Court to find \$2.4 million in losses. And
24 I'm going to focus my remarks on those two estimates because
25 that was the focus of the Fatico hearing and of the briefing.

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1 Neither figure represents a reasonable estimate of
2 loss. I'm going to start with the Chino testimony, and I won't
3 dwell on it because I think our brief verged on the repetitive
4 on this point, your Honor. Our briefs laid out in detail all
5 the reasons the Court should reject the testimony and the math
6 that flows from the testimony of, and the math that flows from
7 Mr. Reyes-Arias.

8 First, he lied to the Court. He was reckless and
9 dishonest enough to lie about testimony given under oath at his
10 guilty plea. Secondly, his testimony about what he did with
11 Mr. Rigo drifted all over the place. For the 2000 to 2004
12 period, the government is sticking with this 100 bottles a week
13 number, and that's what they base all their math on. And I'm
14 going to come back to that.

15 But Mr. Reyes-Arias also testified at the hearing that
16 the number could be 60 to 80 bottles a week, 60 bottles a week,
17 70 bottles a week, 80 bottles a week. He also testified at the
18 hearing that he sold to Mr. Rigo not too frequently. He also
19 testified at the hearing that he never told the agents how many
20 bottles a week he sold to Mr. Rigo. He also testified at the
21 hearing he never knew how many bottles he sold to Mr. Rigo
22 between 2000 and 2004.

23 So this is a man whose testimony is all over the
24 place. This is a man who lied to the Court about important
25 matters, and he lied to the Court about matters he recognized

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1 on the stand were going to be harmful to the government's case.
2 And from that, we can infer that he was prepared to lie or at
3 least exaggerate about matters that might be helpful to the
4 government's case.

5 Now, what is wrong with Mr. Rigo -- pardon me, with
6 Mr. Reyes-Arias beyond the fact that he lied, beyond the fact
7 that his testimony about Mr. Rigo is all over the place? Well,
8 there's no evidence to corroborate what he said about the
9 number of bottles and how frequently he sold. He didn't keep
10 any records of that. That's what he told the government.

11 I find it very hard to believe that in a career
12 spanning, I don't know if it's 11 or 12 years, the man didn't
13 have a shred of paper showing who his customers were or amounts
14 owed or due, but that's his testimony. So he doesn't have
15 anything connecting his business to Mr. Rigo other than the
16 line he testified about in the ledgers that came from
17 Mr. Rigo's house. But that single line falls far short of
18 corroborating testimony spanning 12 years of weekly and monthly
19 transactions.

20 Now, for the 2000-2004 period, as I mentioned, he --
21 testimony was all over the place, but the government has seized
22 on and used in its calculations the 100-bottles-a-week figure.
23 For the eight years between 2005 and 2012 he testified that he
24 sold between 3,000 and \$8,000 worth of drugs on a monthly basis
25 to Mr. Rigo.

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1 That's what he said from the witness stand here, but
2 two years earlier he told Agent Rao, when Agent Rao was getting
3 the arrest warrant for Mr. Rigo, that he sold to Mr. Rigo every
4 other month, half as often. So with respect to the earlier
5 period and the later period, his testimony is unreliable.

6 There's another problem with the government's
7 \$30 million loss estimate, beyond Mr. Reyes-Arias' lack of
8 credibility, beyond the fact that there are no documents
9 corroborating that volume or nature of business. The problem
10 is it's not, in fact, a reasonable estimate, your Honor.

11 And if you look at the government's brief, where they
12 have these charts, I think the prosecutor directed the Court to
13 them earlier, you see that for the 2000 to 2004 time period,
14 the government generated its loss figure by taking 52 weeks a
15 year of business by Mr. Reyes-Arias, over the full five-year
16 period, sometimes the 100 bottles a week figure, using the
17 government's average Medicaid reimbursement value of \$1,000 per
18 bottle, pardon me -- per bottle.

19 Now, how is taking 100 bottles a week as the value
20 you're going to use and applying it to every week for five
21 years an estimate, let alone a reasonable estimate? It's not a
22 reasonable estimate. It's an effort to ring from the evidence
23 the maximum loss. Now, you've got a witness who has said on
24 some occasions it's between 60 and 80 bottles a week. On some
25 occasions he has testified it's 100 bottles a week.

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1 He's also testified it was not too frequently that he
2 dealt with Mr. Rigo, and he's also testified that he doesn't
3 even know how many bottles a week he sold to Mr. Rigo. So when
4 you take all that testimony, wouldn't a reasonable estimate
5 say, well, okay, I'm going to take this 2000 to 2004 period and
6 I'm going to say for some period of time I'll use a hundred,
7 for some period of time I'll use 60.

8 I remember he testified, the prosecutor might have
9 said, I remember my cooperator testified he traveled sometimes,
10 he was home drunk sometimes. So maybe I won't apply my figures
11 to all 52 weeks. I mean, that's how you get to a reasonable
12 estimate. I mean, you take -- if I'm the prosecutor, you take
13 everything your witness has said, like it or not like it,
14 there's stuff that's good for you, there's stuff that's not so
15 helpful to you, you put it all together and say, look, I can be
16 really aggressive and take route one, I could be really wimpy,
17 make the defendant's day and take route three, or I could take
18 the middle ground and take the more aggressive testimony of my
19 witness and discount it by various factors because I'm trying
20 to arrive at a reasonable estimate. Not, I'm trying to ring
21 from this very thin case the last drop of jail time, the last
22 dollar humanly possible.

23 Now, the same problem obtains for the later period of
24 this \$30 million loss estimate, which isn't a loss estimate.
25 It's basically applying math in the most aggressive way

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1 possible. Now, here, between 2005 and 2012, we're not using a
2 bottles-per-week estimate. We have the cooperator saying,
3 well, I sold somewhere between 3,000 and \$8,000 worth of drugs
4 to Mr. Rigo, and the government says, okay, I think I'll pick
5 5,000 because that's in the middle. That seems fair.

6 It's kind of low middle, but this is a witness who, in
7 connection with getting the complaint sworn out, says he did
8 that every other month, and in the Fatico hearing says he did
9 it every month. So does the government come to the Court and
10 say, look, I've taken the \$5,000 number because I'm a
11 reasonable guy, and I'm applying an every-month figure for a
12 certain period of time for every month within this eight-year
13 period and I'm applying every-other-month math calculation for
14 other times? No.

15 I mean, on what business did they chose to pick the
16 most favorable, aggressive favorable components of the
17 cooperator's testimony and wrap it into a calculation and dress
18 it up and call it a reasonable estimate. Just because they
19 call it -- it's not even an estimate. An estimate would apply
20 discounts based on the vicissitudes of the witness' memory and
21 testimony. They didn't do that here. It's not an estimate,
22 and it's not reasonable.

23 Now, this ten-to-one value is particularly vicious,
24 and of it the Court should be particularly skeptical. And what
25 I'm referring to here is the notion that where one sees or

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1 hears reference to, you know, a thousand dollars changing
2 hands, the Court should assume a Medicaid reimbursement of
3 10,000 changing hands.

4 It is true that, as the prosecutors told the Court,
5 that with respect to four of the undercover buys, I think two
6 by Mr. Fernandez and two by Mr. Reyes-Arias, you can look at
7 the government's -- you know, the FBI records or notes and see
8 a ten-to-one ratio. But we're not talking about four
9 transactions that were done in the summer of 2012. That's what
10 Mr. Diskant is referring to, four transactions done in the
11 summer of 2012.

12 That ten-to-one ratio is being applied over a 12- or
13 13-year period without any testimony from Mr. -- from Agent Rao
14 about the basis for doing that. So I assume, I have no reason
15 to doubt, that if you look at the drugs and the money that
16 changed hands in the summer of 2012 in those four deals, that
17 we see a ten-to-one ratio.

18 So presumably, someone in the Department of Justice or
19 in Medicaid could say, you know, the way the street was working
20 or the way the business was working in the summer of 2012,
21 that's what we saw, a ten-to-one ratio.

22 Well, is that what we saw in the prior year, 2011, or
23 2010 or 2009 or '8 or '7 or '6 or '5 or anything back to 2000?
24 Because if it's not, maybe when we do our math for the Court,
25 we should use the ratio that applied in those earlier years.

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1 And if we, in fact, don't know what those ratios were because
2 we didn't think it was important to look them up, we should
3 surely discount the values we're giving the Court so the Court
4 understands we haven't put in the record a basis for the
5 ten-to-one ratio applying over the full period in this case.

6 I concede it applies in the summer of 2012, but the
7 government didn't elicit from its witness, why apply it in
8 other years? Wouldn't it vary? Isn't it a market? Don't the
9 value for drugs go up and down? Don't Medicaid reimbursement
10 values go up and down?

11 I don't know the answer to any of those questions.
12 And if you don't know the answer to those questions, there's no
13 answers in the record, then oughten your loss figures be
14 discounted? Because what if ten-to-one didn't apply in those
15 other years? Because if it didn't, what you're doing with
16 these numbers is ruthless, and premised on speculation, which
17 is sort of the legal problem.

18 Now, the government's treatment of the ledgers suffers
19 from similar problems, and I guess what I'd like to do, your
20 Honor, may I hand to the Court a copy of Exhibit 2002, which is
21 a copy of the ledgers and a copy of exhibit -- pardon me, 202,
22 not 2002, 202, and a copy to Exhibit 212 which is the chart by
23 which the government purports to come up with this \$2.4 million
24 value. May I provide those to the Court?

25 I think the Court recognizes these records. 202 are

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1 the lists that were taken from my client's residence when he
2 was arrested, and 212 is the chart that Agent Rao and the
3 government put together showing how they assigned dollar values
4 to the items on Exhibit 202. Now, I've made a little
5 PowerPoint, but I don't have a computer. If I could just hand
6 the Court a copy and Mr. Diskant a copy and ask you to follow
7 along.

8 THE COURT: Sure.

9 MS. HENDON: I think this will allow me to go a little
10 more efficiently and quickly than if left to my own devices.
11 Thank you. This is marked as defense one.

12 So just pretend there's a screen, and I have a clicker
13 and it's colorful. So I think I sort of lay things out
14 pretty -- in a straightforward way, at least this is our
15 position, your Honor. If you look at the first page,
16 Government's Exhibit 202 consists of 13 pages, 12 of which are
17 unique. What that means is that one of the pages is simply a
18 photocopy of the other.

19 So the parties, when we sit and calculate values
20 associated with these pages, really focused on 12 pages, not
21 13. And the government elected to rely on ten of these 12
22 unique pages to generate the 2.4 million loss figure in
23 Government's Exhibit 212.

24 If you turn to the next page, Page 3, in order to
25 generate the \$2.4 million in losses using the ledgers from

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1 Mr. Rigo's home, the government assigned losses as follows, and
2 you can just find these values on Exhibit 212. We just broke
3 them out here. And what you're looking at on the left-hand
4 column are just the Bates numbers, the Bates page numbers for
5 the ledgers. So the government, using its methodology, reaches
6 a total of \$2.4 million across those ten pages.

7 If you turn to the next page, Page 4, I want to show
8 you what the government did here, and this comes right from
9 Agent Rao's testimony. He said he made the chart. So we've
10 blown up a copy of one of the lists. It's Bates page 67. And
11 we've circled just randomly two of the entries here, and
12 Mr. Reyes-Arias testified when he looked at one of these lists,
13 that he provided the list he was shown to Mr. Rigo, a list of
14 medications that he had available for sale, and he said
15 Mr. Rigo, in turn, would fill in the prices he'd pay for them.
16 And that's at transcript 4810 through 4905.

17 So here, you see the first item blown up in a box,
18 Truvada, the drug name; 46 would be the quantity; 180 per
19 bottle, we all assume would be -- or at least Agent Rao assumed
20 would be how you calculate the street value of that
21 particular -- I think Agent Rao said transaction or
22 contemplated transaction. And then you see the street pricing
23 there. And then we just did the same thing twice; so you could
24 sort of see the methodology that the government contends is
25 reflected on the exhibit on Page 67.

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1 And I think we've -- on Page 5, we're now showing how
2 the government did its math, 46 bottles, and these figures on
3 Page 5 of Defense Exhibit 1, all come from the Government's
4 Exhibit 212. So you can see these are the values that Agent
5 Rao used to sort of come up with his ultimately \$2.4 million,
6 46 bottles, 30 pills per bottle. And instead of using the
7 street value, the government has used the Medicaid
8 reimbursement value.

9 And, again, we just repeat that again so you can see
10 it. And if you turn to Page 6, we say that the government
11 erroneously includes three pages of lists bearing no indicia of
12 a transaction or intended transaction. So let's look at those.

13 Recall on the earlier pages of this PowerPoint you see
14 a drug name, a quantity of bottles, presumably, and a street
15 pricing calculation. But if you look at Page 7 and Page 8 and
16 Page 9, these lists, from the testimony, really just look like
17 inventory, drugs somebody has available for sale.

18 I think Ms. Andur elicited from Agent Rao that that's
19 what these lists are consistent with. There's no indication
20 that anyone thought about pricing, sought pricing, proposed
21 pricing. That list on Page 7 of Defendant's Exhibit 1 is very
22 different looking than the others that the Court has seen, and
23 if you turn to Page 8, you'll see again another list that if
24 you just wanted to draw a reasonable inference about what this
25 was, based on the testimony at the hearing, you might conclude

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1 it was a list of drugs and the amount of drug available for
2 sale.

3 Not that anyone made a bid. Not that anyone's made an
4 offer. Not that anyone has done any sort of chicken scratch
5 here to figure out what they might like to buy or sell, and the
6 same is true on Page 9. And the testimony is in the record
7 that these lists are consistent with lists of inventories that
8 are available.

9 So Page 10, despite the lack of evidence connecting
10 Mr. Rigo to any transaction or proposed transaction, the
11 government assigns losses of 1.5 million based on these three
12 pages alone. And if you turn to Page 11, we show you what the
13 government did here, and it's not -- you know, it's not
14 complicated.

15 Even though there's no evidence of pricing being
16 sought or provided with respect to these three pages, the
17 government simply took, you know, total number of drugs and the
18 Medicaid reimbursement value of those drugs and did exactly the
19 same kind of computation that it did on the balance of those
20 pages. But just by removing those three pages from the mix,
21 your Honor, if you turn to Page 1, that \$2.4 million loss
22 figure comes down to \$851,394.11.

23 So what is my point here? I'm not here proffering an
24 \$851,000 loss figure to the Court, although I think if the
25 Court were going to base its decision here on these records, it

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1 could look at the records the way we've suggested here. My
2 point is consistent with my larger point this morning, which is
3 these records, we don't really know how they were used, who
4 they were used by.

5 We don't know whether Mr. Rigo used all of them. You
6 know, they were folded up in his notebooks. Maybe he was given
7 some and just didn't feel like working that day; so he put them
8 in a book or, you know, folded them up and put them away.
9 Maybe he used some that have chicken scratch on them, which if
10 it's his handwriting, which we don't know, but I'm trying to
11 put myself in the shoes of a prosecutor, a prosecutor
12 proffering to the Court a reasonable estimate based on these
13 records, not let me take these records and ring from each line
14 every dollar I possibly can.

15 That's not reasonable when there's no evidence about
16 which of these lists Mr. Rigo ever used, whether any of the
17 handwriting even on the pages at the front of my exhibit, even
18 the chicken scratch, there's no evidence that that's Mr. Rigo's
19 handwriting. We don't know how these records were used or
20 really what they're records of.

21 So if we don't know that, might we not start with 2.4
22 million and then apply some sort of, you know, discount factor
23 that would reflect all that we don't know? And the fact that
24 we're making a lot of assumptions here, and we're not doing it,
25 you know, at a Christmas pageant, we're doing it in the context

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1 of sentencing.

2 You know, the government's proposed losses here drive
3 the guidelines 22 levels up that fraud chart. Once you get
4 over that million dollars, there's an adjustment, and then
5 there's 20 levels up. So this is serious business. But if
6 we're going to put in competing loss estimates, I don't think
7 we should have to, but I'm offering to you what the government
8 should have, not my most aggressive case with a little bit of a
9 softening.

10 On the 3,000 to \$8,000 a month Chino testimony, for
11 the latter period, they didn't pick the 8,000, they picked 5,
12 and they picked a Medicaid value of \$1,000. I don't know where
13 that was from, but that is what they picked. Maybe they could
14 have picked 10,000, but there are places where they seemed to
15 have gone in the right direction.

16 But given all that is unknown and all that was not
17 explored, investigated or, most importantly, proven in this
18 case, these are very, very aggressive projections. They are
19 not reasonable estimates of loss. Thank you, your Honor.

20 MR. DISKANT: May I have a brief rebuttal?

21 THE COURT: Yes.

22 MR. DISKANT: Thank you, your Honor. There are two
23 sort of broad points I want to make because I think it's
24 important to keep in mind with respect to virtually everything
25 Ms. Hendon just said. The first pertains to this notion of a

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1 middle ground, and I think it's very clear that the Court keep
2 in mind that the government did precisely what Ms. Hendon was
3 just speaking about. We just did it in a manner that was
4 slightly different from the way she did it, which is that we
5 did the math and we laid it for the Court and we got an
6 astronomical loss figure of over \$30 million.

7 We're not asking the Court to make that finding
8 because we acknowledge that these are estimates. We
9 acknowledge that witness memories are fallible. We acknowledge
10 that there are a lot of assumptions built into the analysis.
11 We're asking the Court to make a finding that's a quarter the
12 of that, just 25 percent.

13 \$7 million, we think that that is entirely consistent
14 with the approach at Ms. Hendon just outlined for the Court
15 because the government, of course, recognizes that there are
16 weaknesses in every case, there are weaknesses in every
17 witness' testimony. But we believe that that \$7 million figure
18 is, in fact, the very middle ground that she posits, and is
19 entirely consistent with the evidence in this case.

20 Now, the second point that I want to raise to the
21 Court, because Ms. Hendon alluded to it, is this notion of
22 acceptance of responsibility. The government is not trying to
23 intimidate anyone, of course. The issue, however, is that
24 Ms. Hendon keeps taking the position that she may know the
25 answer, but she's not going to tell the Court.

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1 Her client concedes that he did this for a long period
2 of time, but he's not going to tell you exactly what he did,
3 we're just going to put the government to the burden. That's a
4 trial position. The defendant is entitled to take that
5 position, the defendant is entitled to put the government to
6 it's burden, but as the guidelines make clear, that's generally
7 not consistent with acceptance of responsibility because
8 acceptance of responsibility doesn't generally permit a
9 defendant, at least a defendant seeking the reduction, to
10 falsely deny or frivolously contest conduct relevant to
11 sentencing.

12 So let's talk about this drug ledger, for example, and
13 Ms. Hendon has a PowerPoint. I'm a little bit less
14 sophisticated, but I want to focus on the ledger itself,
15 Government Exhibit 202. The question for the Court is whether
16 it is more likely than not, based on these pages, that the
17 defendant was a big-time participant in this scheme and
18 involved in selling lots of bottles of this medicine. And the
19 answer to that question is, of course.

20 One has to wonder, in effect, what we're really doing
21 here fighting about this. You know, Ms. Hendon says there's no
22 proof of a sale on some of these pages. It's completely
23 irrelevant. Even if all these reflect is inventory, those
24 inventories are properly attributable to the defendant as loss
25 amounts for any number of reasons.

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1 First, they are properly attributable to the defendant
2 because if they are the inventory of a coconspirator, that's
3 part of the conspiracy and clearly attributable to him under
4 governing law.

5 But second of all, even if there was no secondary or
6 tertiary sale, the fact that the inventory was created means
7 that Medicaid was ripped off. Because keep in mind how that
8 inventory is generated. If Mr. Reyes-Arias is generating
9 inventory, that means he's buying these medicines off the
10 street. That means Medicaid is being defrauded.

11 So even if all this page, for example, reflects -- and
12 I'm pointing to Page 1 of Government Exhibit 202 -- is in
13 inventory, Medicaid has already suffered the loss. And if a
14 co-conspirator of the defendant is providing this to him in
15 contemplation of a sale, the defendant is responsible for that
16 amount. That's the \$2.4 million.

17 Now, the second reason that \$2.4 million figure is
18 important is because it entirely corroborates the other
19 testimony in the case. And Ms. Hendon pointed the Court to a
20 number of instances in which she claimed the witness lied or
21 perjured himself or mislead the Court, and I would urge the
22 court to be skeptical of those representations for a couple of
23 reasons.

24 First, I think Miss Hendon was misquoting or partially
25 quoting in a number misleading ways. For example, the witness

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1 did tell agents that he sold to the defendant not too
2 frequently but that was in the context of a comparison. What
3 he said was, yeah, I sold to the Pancho every week. I sold to
4 the defendant not too frequently, maybe once a month. That's a
5 very, very important context.

6 Similarly, this notion of a hundred bottles a week.
7 Yes, the witness very candidly said sometimes it was 60 to 80.
8 He also said sometimes it was more than a hundred, which is why
9 a hundred is a reasonable estimate. That's what the government
10 is trying to do here.

11 With respect to the ten-to-one ratio, there actually
12 is evidence in the record to support the fact that the Medicaid
13 values don't change all that much year to year. We offered the
14 2011 tech table, in addition to the 2012. Those are both in
15 the record as Government Exhibits 201 and 202, I believe.
16 There's very little change year to year in the Medicaid
17 reimbursement value.

18 And then one more point I wanted to make, because I
19 think this also sort of hammers home the government's
20 fundamental disagreement with the approach that the defendant
21 is taking in this proceeding, which is that Ms. Hendon talked
22 to you a fair bit about the transcript, Government Exhibit 211,
23 in particular this loss suffered by Conrado, and she pointed
24 the Court to Page 29 of the transcript.

25 And the problem with the approach that Ms. Hendon is

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1 urging you to take is it just doesn't make any sense. You
2 know, one could conceivably pluck a sentence out of the middle
3 of nowhere and say, well, if somebody is talking about a
4 \$200,000 loss, we don't have any idea how that loss occurred
5 and/or who Conrado was, but that's not what we offered.

6 Now, as an initial matter, we did offer testimony in
7 evidence about who Conrado was. Special Agent Tony Romero took
8 the stand and told your Honor about who Conrado was, that he
9 had been identified, that he had been arrested, that Conrado
10 was someone who purchased these medicines from the defendant
11 and from Pancho, which is why Pancho and the defendant are
12 talking about sales and losses to Conrado in this transcript.

13 We offered you the transcript of Conrado Vasquez's
14 guilty plea, which was entered shortly thereafter, as well as
15 the charging instrument against him. Those are all marked as
16 government exhibits. They are all in the record. But again,
17 more importantly, context here is everything.

18 Look at the conversation that the defendant is having
19 with Pancho on pages 28 and 29 when he talks about Conrado and
20 the loss to Conrado. It starts with the defendant at the top
21 of that page saying "I'm fucked. The Italian guy sold the
22 pharmacy." That's the person the defendant is selling these
23 medicines to. They're not talking about some random business.
24 They're talking about this scheme.

25 They then go on. Pancho says: Really? The defendant

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1 says: Yes. They then go on to talk about Conrado and the loss
2 they suffered to Conrado, and they then keep going on. This is
3 in the context of a conversation about the scheme. They are
4 talking about other people they do business with in the scheme.
5 It is entirely logical and entirely permissible. Indeed, the
6 only permissible inference, really, for the Court to draw,
7 they're talking about a drug transaction with Conrado.

8 The same, of course, applies to the drug ledgers.
9 There's really only one permissible inference to be drawn from
10 these. The defendant did not have these in his notebooks in
11 his bedroom because he liked doodling the names of medicines
12 when he got bored. He didn't like collect scrap papers that
13 just so happened to have the names of these medicines listed on
14 them.

15 They support the loss amount the government is urging
16 here. So we believe it is a reasonable estimate of loss. We
17 believe it is precisely the middle ground that Ms. Hendon is
18 asking the Court to take, and we believe it is consistent with
19 the standard of what the Court should adopt as loss.

20 THE COURT: Thank you all very much. I appreciate the
21 help, and I will reserve decision.

22 MR. DISKANT: Thank you.

23 MS. HENDON: Thank you.

24 (Adjourned)
25